

E-Filed 11/9/06

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SAFRONIA DODD-OWENS, et al.,

Plaintiffs,

v.

KYPHON, INC.,

Defendant.

Case Number C 06-3988 JF (HRL)

ORDER (1) DIRECTING THAT FIRST AMENDED COMPLAINT BE FILED AS OF RIGHT; (2) DENYING AS MOOT MOTION TO FILE FIRST AMENDED COMPLAINT; AND (3) DENYING AS MOOT MOTIONS TO DISMISS AND TO STRIKE ORIGINAL COMPLAINT

[re: doc. nos. 9, 10 and 20]

Plaintiffs filed the complaint in the instant action on June 27, 2006. Defendant filed motions to dismiss and to strike, which motions were set for hearing on November 17, 2006. On October 27, 2006, while Defendant's motions remained pending, Plaintiffs filed a motion for leave to amend the complaint, accompanied by a proposed first amended complaint. Pursuant to Federal Rule of Civil Procedure 15(a), "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." A motion to dismiss does not constitute a responsive pleading within the meaning of Rule 15(a); Plaintiffs thus do not need leave of court to file their proposed first amended complaint. *See Crum v. Circus Circus Enterprises*, 231 F.3d 1129, 1130 n.3 (9th Cir. 2000). Accordingly, the Court will direct the

1 Clerk of the Court to file Plaintiffs' proposed first amended complaint as of right and will deny
2 as moot Plaintiffs' motion for leave to amend.

3 Defendant's motions are directed toward Plaintiffs' original complaint. The Court
4 therefore will deny those motions as moot and vacate the hearing date of November 17, 2006.
5 Defendant shall respond to the first amended complaint within twenty days of service of this
6 order.

7 **ORDER**

- 8 (1) The Clerk of the Court is directed to FILE Plaintiffs' proposed first amended
9 complaint, attached as exhibit 1 to docket no. 20;
10 (2) Plaintiffs' motion for leave to amend is DENIED AS MOOT;
11 (3) Defendant's motions are DENIED AS MOOT; and
12 (4) Defendant shall respond to Plaintiffs' first amended complaint within twenty days
13 after service of this order.

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15 DATED: 11/9/06

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18 JEREMY FOGEL
19 United States District Judge
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1 This Order was served on the following persons:

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